

December 3, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Sajit Gandhi

Date of Filing: October 24, 2003

Case Number: TFA-0043

This Decision concerns an Appeal that was filed by Sajit Gandhi from a determination made by the Director, Policy and Internal Controls Management, National Nuclear Security Administration (hereinafter referred to as “the Director”). This determination was issued in response to a request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In his Appeal, Mr. Gandhi requests that we review the Director’s determination that certain documents are exempt in their entirety from mandatory disclosure.

I. Background

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information agencies are not required to release. Under the DOE’s regulations, a document that is exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

In his FOIA request, Mr. Gandhi sought access to documents relating to the Khmelnytsky 2 and Rovno 4 (K2R4) Nuclear Power Project of the Ukraine. In his determination, the Director identified seven documents as responsive to the request. Documents One and Two were provided to Mr. Gandhi and documents Three through Seven were withheld in their entirety under 5 U.S.C. § 552(b)(5) (Exemption 5). Exemption 5 shields from mandatory disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). The determination issued to Mr. Gandhi points out that Exemption 5 incorporates the deliberative process privilege, which protects from mandatory disclosure advice and opinions that are part of the process by which agency decisions are made. It adds that the withheld documents are draft documents, which by their nature are pre-decisional and deliberative and reflect only the tentative view of their authors, and not final agency policy on matters they discuss. In his Appeal, Mr. Gandhi requests that we review this determination.

II. Analysis

A. Applicability of Exemption 5

As indicated in the determination letter, Exemption 5 encompasses the governmental deliberative process privilege, as well as the attorney-client and attorney work-product privileges. *See, e.g., Coastal States Gas Corp. v. DOE*, 617 F.2d 854 (D.C. Cir. 1980) (*Coastal States*). The deliberative process privilege shields from mandatory disclosure documents that are “predecisional” and “deliberative,” *i.e.*, that were created during agency consideration of a proposed action and that were part of a decision making process. *Darci L. Rock*, 13 DOE ¶ 80,102 (1985); *Texaco, Inc.*, 1 DOE ¶ 80,242 (1978). The privilege thus covers documents that reflect, among other things, the personal opinion of the writer rather than the final policy of the agency. *Coastal States*, 617 F.2d at 866.

Consequently, the privilege does not generally protect purely factual material. There are, however, exceptions to this rule. The first exception is for factual material that was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Communications v. Department of Air Force*, 815 F.2d 1564 (D.C. Cir. 1987). The second exception is for factual material that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. Department of Health and Human Services*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5. *Coastal States*, 617 F.2d at 866.

In order to determine whether this Exemption was properly applied, we have reviewed the five withheld documents. We find that Documents Three and Five through Seven were properly withheld. They are clearly drafts, and consist primarily of opinions and recommendations concerning United States policy as it relates to the K2R4 Project and other Chernobyl-related issues. Although these documents do contain some factual material, it is inextricably intertwined with deliberative material, such that release of the factual material would compromise the deliberative process involved. However, Document Four consists primarily of factual material concerning the April 26, 1986 nuclear accident at the Chernobyl plant and its aftermath. It is not inextricably intertwined with exempt, deliberative material. However, based on the information before us, we are unable to determine whether the first exception applies, *i.e.*, whether the factual material was selected from a larger collection of facts as part of the agency's deliberative process, and release of either the collection of facts or the selected facts would reveal that deliberative process.

We will therefore remand this matter to the Headquarters FOI and Privacy Acts Group for transmittal to the Director. On remand, the Director should review Document Four, determine whether release of the factual material in the document would reveal the deliberative process involved, and issue a new determination to Mr. Gandhi. If, after further review, the Director continues to believe that the document should be withheld in whole or in part, he should specify the deliberative process of which the document

is a part and describe the manner in which release of any withheld information would compromise that process.

III. Public Interest Determination

The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that “[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest.” 10 C.F.R. § 1004.1.

We find that release of Documents Three, Five, Six and Seven would not be in the public interest. Although the public does have a general interest in learning about the subject matter of the documents, we find that interest to be attenuated by the fact that the withheld material is composed mainly of predecisional, non-factual recommendations and opinions, and would therefore be of limited educational value. Any slight benefit that would accrue from the release of the withheld material is far outweighed by the chilling effect that such a release would have on the willingness of DOE employees to make open and honest recommendations on policy matters. Accordingly, we conclude that release of the withheld information would not be in the public interest.

It Is Therefore Ordered That:

(1) The Appeal filed by Sajit Gandhi on October 24, 2003 is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.

(2) This matter is hereby remanded to the DOE’s FOI and Privacy Acts Group for transmittal to the Director, Policy and Internal Controls Management, National Nuclear Security Administration for further proceedings consistent with the guidelines set forth in this Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are located, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 3, 2003